Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

(25)

No. 02-626

IN THE
SUPREME COURT OF THE UNITED STATES

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

-v.-

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, THE AMERICAN WATER WORKS ASSOCIATION, AND THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an addition of pollutants requiring a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1342 (2003).

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INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District,* 280 F.3d 1364 (11th Cir. 2002).[1]

Amici represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring clean and safe water in our country. However, *amici* also have an interest in ensuring that their activities are regulated with suitable laws, and believe that the Eleventh Circuit's erroneous decision interferes with appropriate local water management.

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply and safety needs. Countless water management systems throughout the

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

country transfer water to areas that need water or away from areas in danger of flooding. Operation of canals, locks, and dams involves movement of water from one body – whether natural or constructed – to others. *Amici* support petitioner's request that the Court reverse the Eleventh Circuit Court of Appeals' decision because it threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act.

Amici are troubled by the Eleventh Circuit's decision and the earlier Second Circuit decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), on which the Eleventh Circuit relied, because they dramatically change the regulatory structure for local governments and other water managers by holding that transfers of natural water, in the context of routine water management activities, require Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES, permits). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operates pursuant to such a federal permit. Based on the numerous water management structures that predate the enactment of the Clean Water Act in 1972, it was clear to Congress when the statute was developed that the nation depended on such facilities. There is no indication in the language or history of the Clean Water Act that Congress intended to interfere with these basic structures' functions, which are now threatened by the Eleventh Circuit's holding. The statute was comprehensively amended in 1987 and has been amended several times since. At no time has Congress given any indication that it believed the

NPDES program should apply to these water management structures.

Amicus the City of New York (the City), a political subdivision of the State of New York, owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply system depends on transfers of natural, untreated water from each reservoir downstream to the next. As discussed below, the City's ability to supply sufficient water to fulfill its demand is threatened by the Second Circuit's decision in *Catskill Mountains*. In addition, as a result of that decision, the City has already been assessed over $5.7 million in past penalties for operating a water supply facility that has been on line for nearly eighty years.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's 168 members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979,

represents more than 100 local and state flood control and stormwater management agencies. NAFSMA members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters. The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. NAFSMA is concerned that routine flood management activities would require NPDES permits under the Circuit Court's decision.

The American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to the improvement of drinking water quality and supply. Founded in 1881, the Association is the largest organization of water supply professionals in the world. AWWA's 57,000-plus members are leaders in water quality analysis, technology development, treatment and distribution of drinking water, water management, and water use. Its members represent the full spectrum of the drinking water community, including utility managers, plant operators, environmental advocates, state and federal regulators, scientists, academicians, and others who hold a genuine interest in water supply and public health. AWWA's membership includes approximately 4,800 local or regional drinking water utilities, which collectively provide safe drinking water to more than 80 percent of the American people.

The Association of Metropolitan Sewerage Agencies (AMSA) represents the nation's publicly-owned wastewater treatment agencies (POTWs). AMSA's nearly 300 member agencies provide the majority of the U.S.

population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA members operate their POTWs under the Clean Water Act's NPDES permitting program. AMSA members are concerned, however, that the Eleventh Circuit's decision unnecessarily will subject new aspects of their operations to NPDES permitting for the first time.

SUMMARY OF ARGUMENT

This case is of great importance to the nation's municipal water management agencies. The ruling of the Eleventh Circuit, if not overturned, will burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. In perhaps the majority of cases, local water management agencies will be unable to obtain or comply with NPDES permits for facilities that are essential to many public uses, including flood control, ensuring a reliable supply of water for domestic, commercial, and industrial uses, and fire suppression. Where it is possible to comply with permit terms and conditions, the cost of doing so is incalculable. The harm to the public will be enormous and direct if the Eleventh Circuit decision is upheld, while in most cases the decision will not lead to any measurable environmental benefit.

Municipal and regional water management systems existed in the United States for decades before the enactment of the Clean Water Act in 1972. Pub. L. 92-500, 86 Stat. 880 (Oct. 18, 1972). These systems are designed to move water from one natural body to another, or to change the flow of water. During the 30 years since its enactment, the Clean Water Act has never, until recently, been interpreted to regulate such transfers and diversions of

natural, untreated water. The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. Similarly, none of the more than 40 states with delegated authority to administer the Clean Water Act permit program by EPA has historically required Clean Water Act permits for these water transfers and diversions. As demonstrated in this brief, the NPDES program is the wrong tool for regulating water transfers and diversions. The consequences of requiring NPDES permits for such activities could be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

Amici emphasize that at the core, our fundamental interest is in protecting our nation's waters. We and our member organizations, governments, and utilities are all engaged in activities intended to protect, treat, reclaim, and otherwise improve water quality. In arguing that the NPDES program is not the appropriate mechanism for regulating transfers and diversions of untreated water, we do not suggest that such transfers and diversions should not be subject to regulation. However, as discussed below, there are numerous existing provisions in both federal and state law that were designed to assure that water transfers and diversions are managed in ways that avoid pollution. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program. We believe that proper use of these existing measures will address the fundamental concerns of respondents in this case and avoid the significant problems created by the appellate courts' recent attempts to apply the NPDES program to these water transfers in a new way, far outside the program's intended scope.

Indeed, in promulgating the Clean Water Act itself, Congress established a separate provision – independent of the NPDES program – that specifically addresses water transfers and diversions. Congress directed EPA to develop "processes, procedures, and methods to control pollution resulting from … changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). This provision makes clear that Congress recognized that flow diversion facilities should be treated differently from facilities subject to NPDES permits.

This provision shows that Congress recognized the need for flexibility in regulating water diversions to ensure that water management for such purposes as water supply, flood control, and navigation was not unreasonably restricted simply because of naturally occurring water quality conditions. In contrast, the NPDES program places significant pollutant removal responsibilities on the operators of permitted facilities to assure compliance with water quality standards. Where the water manager is simply moving water, without introducing pollutants, requiring NPDES permits may have the anomalous effect of essentially requiring treatment of natural water.

Moreover, requiring flow diversions to receive NPDES permits will overwhelm the already under-resourced NPDES permit program. Over the past 30 years, EPA and the NPDES-delegated states combined have issued some 135,000 Clean Water Act permits for existing discharges. If, as the Eleventh Circuit's decision in *Miccosukee* suggests, the over two million dams and diversion structures across the nation require NPDES permits, a fundamental restructuring of the administration

of such permits-far beyond what Congress envisioned when it created the NPDES program-unquestionably will be required.

TYPICAL BACKGROUND

The facts of the *Catskill Mountains* case provide an example of the types of diversions and transfers frequently undertaken by municipal and regional water management agencies for water supply, flood control, and other local water management purposes. We thus describe the facts in *Catskill Mountains* in some detail to illustrate the types of facilities currently operating today throughout the United States without NPDES permits.

New York City owns and operates a water supply system in upstate New York. The Shandaken Tunnel transfers water from the Schoharie reservoir, one of the two reservoirs that comprise New York City's Catskill water supply system, to the other, the Ashokan reservoir. Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. New York City's average demand for water is about 1.2 billion gallons per day, of which the Catskill system generally provides about 40%. Approximately 40% of the Catskill supply, or 16% of New York City's drinking water, originates in the Schoharie reservoir. The Ashokan reservoir went into service in 1915. The Shandaken Tunnel and the Schoharie reservoir were both on line by 1926.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the Shandaken Tunnel. However, the mountains surrounding the Schoharie reservoir are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. As a result, water from the Schoharie reservoir that is released from the Tunnel

regularly contains elevated levels of suspended solids, and thus turbidity. Extensive research and analysis indicate that even with reasonable structural and programmatic measures in place, the releases from the Shandaken Tunnel regularly will continue to be visibly more turbid than the receiving water, the Esopus Creek.

Clean Water Act permits must include effluent limits to "achieve water quality standards ... including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1) (2003). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (2003). Because there may not be a practicable way to ensure that water released from the Shandaken Tunnel is never more turbid than the receiving waters, it is possible that New York City will be unable to obtain a Clean Water Act permit for its transfer of water through the Tunnel. Under the reasoning of the Eleventh Circuit, which adopted that of the Second Circuit in *Catskill Mountains*, New York City is in violation of the Clean Water Act every time it transfers water through the Tunnel.[2] This could lead to a prohibition against New York City's continued use of this source of approximately 16% of its water supply, jeopardizing the City's ability to ensure an adequate supply of water to meet its daily demand.

Similarly, if the Eleventh Circuit's decision is left to stand, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes

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[2] Indeed, in the *Catskill Mountains* case, on remand, the District Court assessed the City over $5.7 million in penalties for past violations. 244 F. Supp. 2d 41 (N.D.N.Y. 2003).

(including other portions of New York City's water supply system) face a similar impossible dilemma: either to be subject to continual enforcement actions under the Clean Water Act, potentially involving extensive civil and even criminal penalties, or to be required to cease fundamental public water supply and water management activities.

Moreover, it is not always simple to assess the overall impacts of water management activities. In many cases, historic diversions or transfers of natural, untreated water are now vital to sustaining a healthy aquatic environment in the receiving water body. For instance, the generally cold water from the Shandaken Tunnel is essential to maintaining the exceptional trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and "natural" flow (without the Tunnel's contribution) is diminished.[3] If the reasoning of the Second and Eleventh Circuits is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid liability under the Clean Water Act. The result in many cases will be a net detriment to ecosystems that have come to depend on such diverted flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water will be different from one to another, whether the water bodies are in naturally connected watersheds or not. Thus, diversions or transfers of untreated water are likely to involve transfers of water

[3] Indeed, as noted below, New York State requires the City to release specified volumes of water from the Shandaken Tunnel pursuant to its authority to protect natural resources and recreational use of water. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670 (2003).

containing different constituents, and constituents in different concentrations, than may occur in the receiving waters, such as turbidity in the *Catskill Mountains* case or the nutrients at issue in *Miccosukee*. For the reasons set forth herein, however, *amici* urge this Court to find that such incidental movement of the natural constituents of untreated water are not "additions" of pollutants requiring NPDES permits under the Clean Water Act.

ARGUMENT

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. A NPDES permit is required when (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). In *Miccosukee, Catskill Mountains*, and *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), Courts of Appeals have abandoned an established line of appellate cases and have determined that a transfer of untreated water can be an "addition" under the Clean Water Act. This interpretation was wrong for a number of reasons.

I

THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES.

Because the NPDES program lacks both the administrative capacity and the regulatory flexibility necessary to deal appropriately with transfers and

diversions of natural, untreated water, *Miccosukee* and similar decisions like *Catskill Mountains* compromise the continued operation of water supply and management systems across the nation. There are numerous federal and state laws that more appropriately and effectively regulate water transfers and diversions than the NPDES provisions of the Clean Water Act.

A. The NPDES Program Is Not an Appropriate Mechanism for Regulating Diversions of Water.

The recent appellate decisions at issue here threaten the continued operations of certain facilities that are vital for water supply, local government water management, flood control, and navigation. These decisions run counter to Congress' intent that states and local governments retain primary control over local water management decisions.

If these decisions are not reversed, the scope of the Clean Water Act's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 135,000 facilities nationwide" currently have NPDES permits. *See* http://www.epa.gov/compliance/planning/data/ (last updated April 8, 2003). Even with the current universe of permitted entities, EPA and the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B). In fact, in December 1998, EPA identified NPDES permit backlog as a "material weakness" at the Agency. *See* USEPA, Fiscal Year 1998 Integrity Act Report to the President and Congress, http://epa.gov/ocfo/integrity/integrity.pdf at B-3 (last updated December 29, 1998). The deficiency has not been cured as of the Fiscal Year 2002 Report. *See* http://epa.gov/ocfo/

finstatement/2002ar/ar02_goal2.pdf (last updated January 31, 2003). EPA has established a goal of reducing the backlog of all permits to 10 percent by the end of 2004. *See* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm (last updated July 15, 2003). As of March 31, 2003, 18 percent of the approximately 116,000 NPDES permits analyzed had expired. *See* http://epa.gov/npdes/images/permit_backlog.gif. EPA's draft Strategic Plan for 2003-2008 includes reducing the NPDES permit backlog as a key Clean Water Act goal. *See* http:www.epa.gov/ocfo/plan/2003goal2.pdf (last updated March 5, 2003).

Under *Miccosukee* and *Catskill Mountains*, more than two million dams, and countless other diversion structures, across the nation currently operating without NPDES permits will be added to the backlogged and overburdened NPDES program. *See, e.g., National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 182 (D.C. Cir. 1982). In light of the manifest administrative problems with the NPDES program today, a 15-fold increase in the number of entities requiring Clean Water Act permits would without question overwhelm permitting agencies across the nation. The scope of the NPDES program under *Miccosukee* is an order of magnitude greater than either Congress or EPA has envisioned in the more than 30 years since the Clean Water Act took effect.

Moreover, because NPDES permits must include effluent limits to "achieve water quality standards ... including State narrative criteria for water quality," 40 C.F.R. § 122.44(d)(1), the NPDES program lacks the flexibility to deal appropriately with transfers of untreated water. Where the transferred water contains pollutants that are not introduced by the entity operating the transfer, as in *Miccosukee* (where the water contains phosphorus from urban runoff) and *Catskill Mountains* (where the water

contains naturally occurring turbidity), this requirement can place an impossible burden on the transferor.[4] The *Catskill Mountains* case is illustrative. As noted above, there may be no feasible mechanism for ensuring that Schoharie water released from the Shandaken Tunnel meets the New York State water quality standard of no substantial visible increase in turbidity. If the City proves to be unable to obtain a NPDES permit and this Court does not reverse the decisions of the Eleventh and Second Circuits, 16% of the City's water supply may be in jeopardy.

B. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.

Under the Clean Water Act, Congress directed EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," in one of several statutory provisions addressing nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate Federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. *See Consumers Power*, 862 F.2d at 588 ("This supports … the

[4] Moreover, this burden is unfair. The Clean Water Act was intended to regulate entities that *introduce* pollutants, not entities that merely move water that already contains pollutants. *See, e.g., Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377-78 (4th Cir. 1976) (Clean Water Act does not make industrial dischargers responsible for removing constituents occurring naturally in intake water or introduced by upstream discharges).

view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution") (*citing Gorsuch*, 693 F.2d at 177).

In other words, while Congress clearly contemplated that pollutants might be moved within the nation's waters as a result of facilities diverting flow, like the S-9 pumps and the Shandaken Tunnel, the Clean Water Act is structured to address transfers of pollutants resulting from such diversions in a different manner from additions subject to the NPDES permitting requirements of 33 U.S.C. § 1342.

C. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water.

In urging rejection of the NPDES program as the tool to manage the incidental water quality impacts of myriad water movement structures such as the S-9 pumps at issue in *Miccosukee*, *amici* do not suggest that such structures should not be evaluated and regulated to address water quality impacts. Rather, we ask the Court to recognize that many other provisions of federal and state law provide sufficient, and in fact more appropriate, regulatory frameworks to address any water quality impacts of transfers of untreated water. The following section provides examples of such other provisions.

1. Federal Programs

a. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on the state's impaired waters list under the Clean Water Act and therefore subject to the development of total maximum daily loads (TMDL). 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources via NPDES permits and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate means to assess ways to regulate and control pollutants in the water bodies at issue in both *Miccosukee* and *Catskill Mountains*, because, in both cases, the pollutants are generally added by nonpoint sources, and the TMDL program, unlike the NPDES program, considers the relative constituents of both point and nonpoint sources of pollution, as well as a "margin of safety" to protect water quality and account for any uncertainties.

In addition to the TMDL program, states must establish Water Quality Management (WQM) Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. 33 U.S.C. § 1329(a)(1)(A). A WQM Plan "identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution ... in amounts which contribute" to the failure to meet water quality standards. 33 U.S.C. § 1329(a)(1)(B). A WQM

Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been implemented to control pollution from those sources. 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii) (2003). Moreover, the TMDLs that are established under 33 U.S.C. § 1313(d) are incorporated into a state's WQM Plan. 40 C.F.R. § 130.7(a).

The major source of the pollutant at issue in *Miccosukee,* phosphorus, generally originates from nonpoint sources. Similarly, in *Catskill Mountains*, the turbidity and suspended solids of concern enter the Schoharie Reservoir mainly through nonpoint sources, and result from both the natural conditions in the Schoharie watershed and human activity, such as farming, logging, development and disturbances to streambanks and streambeds. The appropriate place to address the pollutants in both cases is where they enter the water. The means to address them are the Clean Water Act's nonpoint source programs, including the TMDL program and state WQM plans.

Regulators, environmental advocates, and the scientific community continually stress that it is far more effective to address pollutants at their source than to try to remove them, or compensate for their impacts, after they have been added to the nation's waters. The decisions in *Miccosukee* and *Catskill Mountains* run counter to this fundamental principle by endorsing an impractical approach, seeking to address pollutants at the wrong end of the conveyance. By attempting to address pollutants when water is transferred rather than when the pollutants are

introduced-after the fact rather than at their sources-the Eleventh and Second Circuits have failed to solve the actual environmental problem–reducing pollution in the nation's waters.

b. Municipal Separate Storm Sewer System Permits

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff, such as those at issue in *Miccosukee*, than requiring individual NPDES permits for the transfers of water containing such pollutants.[5] Under the stormwater provisions of the Clean Water Act, EPA has established permit programs to protect water quality by reducing the pollutants in stormwater runoff from municipalities and other populated areas – initially for areas with populations of 100,000 or greater[6] (the Phase I Program, implemented in the early 1990s) and more recently for areas designated as "urbanized" by the latest census[7] (the Phase II Program, implemented earlier this year).

Municipalities required to obtain permits for their municipal separate storm sewer systems (MS4s) are required to implement best management practices to reduce

[5] Many stormwater discharges are regulated as "point sources" under the NPDES program because stormwater from activities most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points. *See, e.g.*, http://cfpub.epa.gov/npdes/home.cfm?program_id=6 (last updated June 26, 2002).

[6] *See* 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26.

[7] *See* 33 U.S.C. § 1342(p)(6); 40 C.F.R. § 122.32(a)(1).

stormwater pollutants to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii).[8]

Thus, to the extent that the pollutants of concern in a water transfer or diversion come from urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources. The Eleventh Circuit's decision, in contrast, would instead regulate such pollutants once they are already in the waters of the United States, essentially requiring water transfer facilities to "treat" these pollutants in the course of diverting, pumping, or moving the water. This indirect and impractical approach to addressing the underlying water quality concern places regulation at the wrong location, and may place pollutant removal responsibilities on the wrong parties.

c. The Safe Drinking Water Act and Surface Water Treatment Rule

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) *et seq.*, and its implementing regulations, the Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 *et seq.* The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the

[8] New York State law goes even further than the Clean Water Act, requiring MS4s to "take all necessary actions to ensure future discharges do not cause or contribute to the violation of a water quality standard." New York State Department of Environmental Conservation SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Sewer Systems, Permit No. GP-02-02, http://www.dec.state.ny.us/website/dow/MS4Permit.pdf, at 9 (last modified January 8, 2003).

criteria that must be met for a public water system to avoid filtration. *See* 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 NTU immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

The facts of the *Catskill Mountains* case again provide an example of how water transfers are already appropriately reviewed, managed, and regulated. New York City's Catskill system supplies unfiltered water to the City of New York, and thus operates under a Filtration Avoidance Determination (FAD) issued by the EPA under 40 C.F.R. §§ 141.71 and 141.171. The City's most recent FAD, which was issued in November 2002, contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources. The FAD specifically requires the City to address suspended solids and turbidity entering the source waters of the Schoharie Reservoir. The requirements include a stream management program to restore streambanks and streambeds, an agricultural program to reduce pollution from farms near the watershed, and a forestry program to address erosion resulting from logging. Most importantly, the FAD requires the City to study and implement any feasible, effective and cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel.

Thus, the pollutants at issue in *Catskill Mountains* are being addressed under the SDWA and SWTR, both at the location where they enter the water system and after water is released through the Shandaken Tunnel. The FAD program administered under the SDWA and SWTR not only imposes more effective environmental controls than the NPDES permitting program, it also resolves the underlying issues without losing sight of the fact that the

main purpose of the Catskill system is to provide a safe and adequate supply of drinking water to the public. Because the entire supply system, including the Shandaken Tunnel, is effectively regulated under the SDWA and SWTR, it should not be subjected to the intransigence and inflexibility of the NPDES point source permitting program which, if applied to the City's water supply system, will jeopardize the City's ability to provide a safe supply of water to the nine million residents, and countless commercial users and workers, who rely on it. While the specific source control measures in New York City's FAD would not be required of filtered public water systems under the SDWA, many filtered systems throughout the country employ similar measures under state or local law or regulation.

2. State Laws and Regulations

As noted above, in addition to the federal requirements, a number of state laws and regulations address and control pollutants in the context of municipal water management and water transfers. We describe regulatory programs in New York as illustrative of the types of programs that exist throughout the nation. These provisions operate independently from the NPDES program.

Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. *See* New York State Environmental Conservation Law (ECL) § 15-1313(2) (McKinney 2003); *see also* ECL § 17-0301, N.Y. Comp. Codes R. & Regs. tit. 6, § 700 *et seq*. The State classifies bodies of water in accordance with their best use, and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those

classifications. *See id.* Releases that violate the state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. ECL § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's State Pollutant Discharge Elimination System (SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters. ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel.

Finally, New York State regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. ECL §§ 15-0801 and 15-0805.[9] Again, *amici* urge this Court to consider that applying the NPDES permit program to water transfers and diversions will only further complicate and burden these local water management activities, contrary to Congress' intent and in many cases, unnecessarily duplicate existing state requirements.

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[9] Indeed, New York City is required, under regulations promulgated by New York State pursuant to these statutes, to make releases from its Shandaken Tunnel, to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.

II

RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS, UNLIKE THE ESTABLISHED DECISIONS OF THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS, INTERPRET THE TERM "ADDITION" INCORRECTLY.

The transfers or movement of natural, untreated water is not an "addition" of pollutants under the Clean Water Act. In holding that the release of natural, untreated water is governed by the Clean Water Act's permitting requirements as set forth in 33 U.S.C. §§ 1311(a) and 1342, the *Miccosukee* court, as well as the First and Second Circuits, departed from the longstanding interpretation of the term "addition" adopted by District of Columbia and Sixth Circuits in the 1980s. No case law prior to 1996 supports the proposition that the mere diversion or transfer of untreated water, from one water body to another, is, in and of itself, an "addition" of pollutants requiring a Clean Water Act permit. These prior Clean Water Act cases all held that more than a mere diversion of flow from one body to another is necessary to constitute an "addition" - pollutants must be "added" or introduced at the point source itself.

In *Gorsuch*, 693 F.2d at 164, the District of Columbia Circuit Court addressed whether dam-induced water quality changes are "addition[s] that trigger the NPDES permit requirement." The Court agreed with EPA that they were not, because a pollutant was not physically introduced "into the water from the outside world." *Id.* at 175. Once a pollutant already exists in navigable water, transferring that water from one body of navigable water to

another does not "add" the pollutant. Similarly, in *Consumers Power*, the Sixth Circuit held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute an "addition" because the plant simply moved those pollutants already in the water. Other courts have recognized that an addition does not occur where pollution is merely passed "from one body of navigable water to another."[10] *See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River*, 513 U.S. 873 (1994).

In contrast, the Eleventh Circuit held in *Miccosukee* that the South Florida Water Management District needed a NPDES permit to move water over a levee for flood control and water supply purposes. This "mere diversion in the flow of waters" is not the type of activity that Congress intended to cover in the NPDES program. *See United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("Where 'pollutants' exist[] in the waters of the United States before contact with these facilities, the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the water"). The Eleventh Circuit followed the Second Circuit decision in *Catskill Mountains*, concerning the releases of untreated water from New York City's Shandaken Tunnel, and the First Circuit decision in *Dubois*

[10] This is consistent with the language of the statute, which refers to the addition of a pollutant to navigable "waters" rather than to navigable "water." 33 U.S.C. § 1362(12). The use of the collective term "waters" suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

v. U.S. Dep't of Agric., a case involving a private company's diverting water from a pond and two other sources to create snow for skiing, and then returning the water to the pond. 280 F.3d at 1369, n.7.[11]

[11] Subsequent to the Eleventh Circuit decision in *Miccosukee*, the Ninth Circuit held that the release of groundwater pumped during the process of mining into surface waters required a NPDES permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003). *Dubois* and *Northern Plains Resource Council* are distinguishable from *Miccosukee* and *Catskill Mountains*.

Amici represent cities and other public entities engaged in water supply, flood control, and other water management activities. In contrast to the activities of the defendants in *Miccosukee* and *Catskill Mountains*, as well as those of other *amici*, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment and *Northern Plains* defendant Fidelity Exploration and Development Company was extracting groundwater in connection with mining operations.

The First Circuit found it significant in *Dubois* that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from the waters of the United States, and then was released into the waters of the United States after it was processed in the snowmaking equipment. *Id.*

The underlying water discharge in *Northern Plains* is even more distinct from the transfers at issue in *Miccosukee* and *Catskill Mountains*. In determining that groundwater was a "pollutant" in *Northern Plains*, the Ninth Circuit emphasized that, because defendant was engaged in commercial activity, the groundwater qualified as "industrial waste." 325 F.3d at 1161.

The Eleventh Circuit (and the First and Second Circuits before it) departed from the well-reasoned principle, established in *Gorsuch* and *Consumers Power*, that more than a mere diversion of flow is necessary to constitute an "addition" under the Clean Water Act. The First, Second, and Eleventh Circuits' decision to extend the reach of the NPDES program was irrational and contrary to the language and purpose of the Act.

III

THE HOLDINGS OF *GORSUCH* AND *CONSUMERS POWER* ARE NOT BASED ON UNDUE DEFERENCE TO USEPA.

In its attempt to reconcile *Gorsuch* and *Consumers Power* with its decision in this case, the Eleventh Circuit noted that the District of Columbia and Sixth Circuits in those earlier cases may have accorded EPA's interpretation of "addition" undue deference, since they were decided under the standard of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 280 F.3d at 1368, n.5. The Eleventh Circuit relied upon *Christensen v. Harris County*, 529 U.S. 576 (2000) for the proposition that EPA's interpretation is entitled to only a limited degree of deference, rather than great deference, because its interpretation was not subjected to the rigors of notice and comment rulemaking.

Distinguishing between governmental water management activities and commercial exploitation of water is consistent with the goals and policy of the Clean Water Act. 33 U.S.C. §§ 1251(b) and (g).

Although in *Gorsuch*, the District of Columbia Circuit Court of Appeals stated that the EPA interpretation was entitled to "great deference" (*Gorsuch*, 693 F.2d at 170), the decision itself demonstrates that the court did not simply defer to EPA. Rather, it contains a detailed analysis of the specific language of the Clean Water Act and its legislative history, as well as an evaluation of policy, weighing the interests of preserving the integrity of the waters of the United States against the interests of states in water management. Instead of giving undue deference to the EPA interpretation, the *Gorsuch* court labored to ensure that it evaluated the competing interests of the Clean Water Act against local water management issues. Thus, *Gorsuch* is consistent with the *Christensen* standard of deference because the court gave deference to the EPA position, but only to the extent that it was persuaded that EPA's position was consistent with its analysis of the language, legislative history, and policy behind the Clean Water Act.

Because the *Gorsuch* court did not simply defer to the EPA interpretation of the Clean Water Act, *Christensen* does not support the Eleventh Circuit's departure from the principle that the mere transfer of untreated water that naturally contains pollutants is not regulated by the Clean Water Act. Similarly, in *Consumers Power*, while it discussed EPA's position in light of the then-applicable *Chevron* standard, the Sixth Circuit relied on a detailed analysis of congressional intent in reaching its decision that transfers of water from a dam used as a hydroelectric facility were not "additions" under the Clean Water Act. 862 F.2d at 586-88.

In contrast to the District of Columbia and Sixth Circuit Courts of Appeals, which considered several factors in addition to the EPA interpretation, the Eleventh Circuit did not conduct such a detailed analysis. Rather, it used

Christensen to support its departure from the long line of cases interpreting the Clean Water Act, without any consideration of the legislative history or weighing of interests.[12] For the reasons discussed above, *amici* urge the

[12] The Second and Eleventh Circuits assumed that confining water in a dam or reservoir, and then releasing that water, is fundamentally different from diverting water so that it flows from one body into another. In *Catskill Mountains*, the Second Circuit distinguished *Gorsuch* and *Consumers Power* on the theory that in those situations, unlike the discharges from New York City's Shandaken Tunnel, "the water from which the discharges came [in those cases] is the same as that to which they go." 273 F.3d at 492. Similarly, in *Miccosukee*, the Eleventh Circuit found this distinction between inter-basin and intra-basin transfers significant: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." 280 F.3d at 1368-69. There is no language in the Clean Water Act, however, that suggests that the question of whether a transfer of untreated water requires a NPDES permit turns on whether the transfer of water is within the same basin or between separate basins.

Deciding whether the NPDES program applies based on the distinction between inter- and intra-basin transfers, rather than on whether pollutants are in fact being introduced to the nation's waters, reflects a fundamental misunderstanding of the Clean Water Act. The Second Circuit concluded that confining water in a dam or reservoir, and then releasing that water, is so fundamentally different from diverting water so that it flows from one body into another that the latter requires a permit while the former does not. To illustrate this point, the Second Circuit described the dam situation as analogous to lifting soup with a ladle from a pot and then returning the ladleful to the same pot, *Catskill Mountains*, 273 F.3d at 492. That is, the Second Circuit implicitly suggested that an inter-basin transfer would

Court to recognize the validity of the Sixth and District of Columbia Circuits' analyses of the Clean Water Act NPDES requirements and to reject the contrary conclusions of the Eleventh, First, and Second Circuits.

necessarily involve tainting a different pot. But while waters from different sources may have different constituents, or constituents in different concentrations, so may water above and below an impoundment. The natural constituents of untreated water do not trigger the permit provisions of the Clean Water Act. The fundamental purpose of the NPDES provisions is to ensure that new pollutants, such as those from wastewater treatment plants or industrial facilities, cannot be introduced to the nation's waters without a permit.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to reverse the decision of the Court of Appeals for the Eleventh Circuit to avoid serious negative consequences for the many public agencies and authorities nationwide involved in water management for water supply and flood control and related public purposes.

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